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IN THE

Supreme Court of the United States

October Term, 1962

No. 224

DOMINICK TUFARO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No.

DOMINICK TUFARO,

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—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Dominick Tufaro prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above entitled case on April 24, 1963.

A. The Opinion Below

The opinion of the Court of Appeals in this case has been officially reported in 316 F. 2d 240 (1963). It is set forth in Appendix A annexed to this petition.

B. Jurisdiction

The judgment of the Court of Appeals was entered on April 24, 1963. The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by a writ of certiorari is sought of a judgment of affirmance by the United States Court of Appeals for the Second Circuit.

C. Question Presented

Was the petitioner ever shown to constructively possess narcotics so as to activate the statutory presumption contained in 21 U.S.C. Sec. 174?

D. Constitutional Provisions and Statutes

The Constitutional provisions and statutes involved are:

1. United States Constitution, Amendment V.
2. United States Code, Title 21, Sections 173 and 174.

All of the foregoing are set forth in full in Appendix B annexed to this petition.

E. Summary Statement

A two count indictment was returned against the petitioner charging a substantive violation and a conspiracy to violate Title 21, United States Code, Sections 173 and 174. He was found guilty on both counts and sentenced to imprisonment for five years which he is now serving.

F. Reason for Granting the Writ

The petitioner was never shown to constructively possess narcotics so as to activate the statutory presumption contained in 21 U.S.C. Sec. 174.

On November 5, 1959, Guippone, a co-defendant, met with Agent Peterson of the Bureau of Narcotics and discussed the sale of narcotics. That evening Guippone thrice telephoned Peterson. Initially, with respect to a sale of narcotics, later, to inform Peterson that Guippone had located "the kid", i.e., the petitioner. Finally, for Peterson to meet Guippone outside the Hotel Taft in New York City. They did meet and did get into an automobile, where they were joined by the petitioner. Guippone stated that the petitioner was "the kid" that he had previously mentioned, and that he was his "runner". The petitioner thereupon gave Peterson a paper with writing thereon and arrangements were made for a subsequent meeting.

On December 21, 1959, Guippone telephoned Peterson as to a sale of narcotics. Guippone stated that the petitioner was going to bring it, but cautioned Peterson against mentioning to the petitioner that part of the purchase price would be owed by Peterson to Guippone. Moreover, that Guippone would furnish the petitioner with an address which the latter was to give to Peterson, so that he could forward the unpaid balance of the purchase price. Tufaro, telephoned Peterson and told him that he was having difficulty with his car, that he had the stuff and would meet with him shortly. Tuffaro made a second telephone call wherein he stated that he had Peterson's merchandise, but that he was having difficulty in obtaining a parking space and that they were to meet in an automobile. They did meet and

Peterson asked whether he had the merchandise and an address. The petitioner in turn asked whether he had the money. The petitioner gave Peterson an address and told him that the merchandise was in the glove compartment of a parked automobile, and that the compartment would be difficult to open. They thereupon drove to the parked automobile and Peterson obtained a package and so informed the petitioner. The latter thereupon inquired as to how long it would take to check it out, and when informed that it would take sometime, agreed to meet again. They subsequently met at a drugstore and Peterson placed an en elope containing money in a newspaper which had been handed him by the petitioner.

The foregoing in essence constituted the Government's case as against the petitioner and the issue was thus the sufficiency of the Government's proof as a matter of law in a prosecution under Title 21, United States Code, Sections 173 and 174. The District Court, as well as the Court of Appeals held it to be sufficient.

The petitioner respectfully submits that this holding was error.

The fundamental distinction between a New York State and Federal narcotic prosecution is that in the latter the accused must have knowledge of illegal importation or such possession as will activate the statutory presumption contained in Section 174.[1] For once possession is shown a jury may convict unless a satisfactory explanation is proffered by the defendant. *United States* v. *Evans*, 312 F. 2d 556

[1] In *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932), the Harrison Narcotics Act, 26 U.S.C. Sec. 2550, *et seq.* was construed as being not aimed at sales of narcotics qua sales since that would be a matter beyond the scope of Congressional power.

(2nd Cir. 1963); *United States* v. *Mont*, 306 F. 2d 412 (2nd Cir. 1962).

No evidence whatever was introduced as to the petitioner's knowledge of illegal importation, nor was any direct evidence introduced as to actual possession.[2] The issue is thus narrowed as to whether the petitioner's activities rose to the level of constructive possession of narcotics.

The Court in its charge defined constructive possession as follows:

> "A person who, although not in actual possession, knowingly has the power to control the disposition of the drug or exercises dominion and control over the drug, or has a working relationship or a sufficient association with one having physical custody of the drug so as to enable him to assure its production without difficulty to a customer, as a matter of course is said to be in constructive possession of the contraband" (S.M. 515).

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[2] Judge Levet charged the jury:

> ". . . you will probably have to consider whether or not there was either actual possession or constructive possession; and as I recall it there is no direct evidence of actual possession." (S.M. 536)

The Court did *not* charge as to actual possession being shown through circumstantial evidence. The Government did not except to the foregoing and it now cannot argue that there was actual possession since the jury must be instructed on all the elements necessary to prove the commission of the crime. *United States* v. *Messiah*, 307 F. 2d 62 (2nd Cir. 1962).

A juxtaposition of the foregoing with the petitioner's activities reveal the following:

Charge	*Proof*
1. "Knowingly has the power to control the disposition of the drug or exercises dominion and control over the drug."	Of all the evidence presented by the Government as to the appellant's actions and telephone conversations the one element that was clearly lacking was "power", blatant or subtle. Tufaro neither did nor could in any way exercise dominion or control so as to alter or modify the existent definitive arrangements between Guippone and Peterson. Tufaro could neither buy nor sell nor could he contract to do so. He could not arrange price, time or place of delivery. To depict him as the alter ego of Guippone is to engage in forensic fantasy.
2. "Has a working relationship or a sufficient association with one having physical custody of the drug so as to enable him to assure its production without difficulty to a customer."	Assuming arguendo that there was a working relationship or a sufficient association with Guippone who had physical custody of the drugs, yet there was never a scintilla of evidence to indicate that the appellant could assure its production, with or without difficulty, to a customer.

That he may have participated in a transaction, with knowledge that the commodity involved was a narcotic is insufficient, standing alone to warrant a conviction under Section 174, *United States* v. *Jones*, 308 F. 2d 26 (2nd Cir. 1962). For as that court said at 33:

> "The Government's final contention is that all that is required to convict one of having violated 21 U.S.C.A. §174 is proof that he participated in a transaction with knowledge that the commodity involved therein was a narcotic. The violence this contention does to the language of the statute that explicitly

> requires that the violator have knowledge of the illegal importation of the narcotic, not merely a knowledge that the commodity is a narcotic, is sufficient to force a rejection of the contention."

The Government having failed to show Tufaro's actual possession or as aptly described in *Hernandez v. United States of America*, 300 F. 2d 114 (9th Cir. 1962), at 124; "possession by physical custody," must establish the petitioner's constructive possession in order to encompass him within the statutory presumption of Section 174. To do so the Government must prove that the petitioner's actions were more sinister than was Jones in *United States* v. *Jones, supra*. It is salient to recall that Jones, upon being informed by federal narcotic agent Brown that the latter wished to purchase narcotics informed him that none was available because of a prior police raid. Jones thereupon offered to introduce Brown to his connection, "Big Charlie" who dealt in quality merchandise. Jones, after an initial lack of success in locating "Big Charlie," did bring Brown to him. He then left Brown to privately converse with "Big Charlie". Jones then returned to Brown and advised him that contraband would be available at a set price. The price being acceptable, "Big Charlie" gave Brown the contraband and Brown paid "Big Charlie" $150.00, all in Jones' presence. Jones thereupon asked for and received a sum of money from Brown for making the introduction.

The Court of Appeals in ordering Jones' acquittal, held that all of the foregoing did not constitute "constructive possession". Moreover, that nothing was proven to show that Jones, even though after talking to "Big Charlie" informed Brown of the price, had any independent control

over the narcotics or that he was able to assure its production. How can the role of the petitioner be deemed to be greater than that of Jones "the broker", who requested and received remuneration for his services?

Lest the Government contend that the appellant's role was that of a purposeful and knowing aider and abettor to Guippone in his narcotics activities, it would still be required to prove constructive possession or knowledge of illegal importation. *United States* v. *Jones, supra.* Likewise under the conspiracy count, there being no evidence of knowledge of illegal importation, the Government would be obliged to show Tufaro's actual or constructive possession. *United States* v. *Hernandez*, 290 F. 2d 86 (2nd Cir. 1961).

In view of the foregoing it is submitted that the petitioner was never shown to constructively possess narcotic drugs so as to activate the statutory presumption contained in 21 U.S.C. Sec. 174. Moreover even if the petitioner were shown to have constructive possession, such possession does not come within the purview of this section. *United States* v. *Santore*, 290 F. 2d 51 (2nd Cir. 1960), dissenting opinion of Learned Hand at 70-1, cert. denied 365 U. S. 834 (1961).

CONCLUSION

For the reasons hereinabove set forth this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER
THEODORE KRIEGER
Attorneys for Petitioner

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 349—October Term, 1962

(Argued April 24, 1963 Decided April 24, 1963)

Docket No. 28010

UNITED STATES OF AMERICA,

Appellee,

v.

DOMINICK TUFARO,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*
SWAN and WATERMAN, *Circuit Judges.*

Appeal from conviction for violations of the narcotic laws; 21 U. S. C. §§176 and 174, in the District Court for the Southern District of New York, Richard H. Levet, J., before a jury. Affirmed.

Appendix A
Opinion of the United States Court of Appeals

MARTIN R. GOLD, Assistant U. S. Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney, Southern District of New York, New York, N. Y., and Peter Emmet Fleming, Jr., Assistant U. S. Attorney, New York, N. Y., on the brief) *for appellee.*

THEODORE KRIEGER, New York, N. Y. (Albert J. Krieger, New York, N. Y., on the brief) *for defendant-appellant.*

PER CURIAM:

We affirm in open court the judgment of the District Court for the Southern District of New York entered upon a jury verdict convicting the defendant of a violation of the narcotic laws and conspiracy so to do, 21 U. S. C. §§173 and 174.

APPENDIX B

Constitutional Provision

AMENDMENT 5, UNITED STATES CONSTITUTION.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutes Involved

Title 21, United States Code.

"173. IMPORTATION OF NARCOTIC DRUGS PROHIBITED; EXCEPTIONS; CRUDE OPIUM FOR MANUFACTURE OF HEROIN; FORFEITURES.

It is unlawful to import or bring any narcotic drugs into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium or coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs

imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug, be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision shall be placed in the custody of the board and in its discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes (Feb. 9, 1909, c. 100, 2, 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, 1, 42 Stat. 596; June 7, 1924, c. 2[illegible]2, 43 Stat. 657."

"174. SAME; PENALTY; EVIDENCE.

Whoever, fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought into the United States

contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned, not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 224

DOMINICK TUFARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 316 F. 2d 240.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1963. On May 24, 1963, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to June 22, 1963, and the petition

was filed on June 21, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence supports the jury's verdict of guilty.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York of violating and conspiring to violate 21 U.S.C. 173 and 174 (unlawful importation of narcotics), and was sentenced to imprisonment for five years.[1] The court of appeals affirmed the conviction in open court.

The evidence showed that one Guippone introduced petitioner to Peterson (in reality a government agent) as "the kid" employed as his runner. When arrangements were made for a sale, Guippone told Peterson that petitioner would bring the "stuff" and would furnish an address where Guippone could be reached. Guippone told Peterson not to mention to petitioner the fact that Peterson would owe a balance (R. 5a-8a). On the night of the sale, petitioner called Peterson to say he had the "merchandise" (R. 12a). When he met Peterson shortly thereafter, he gave him the promised address and told him the merchandise was in a parked automobile at a designated spot (R. 9a). Petitioner drove Peterson to the described parked automobile, told him the merchandise was in the glove

[1] The relevant statutory provisions are reprinted in the petition, pp. 3a-5a.

compartment, explained that he would have trouble opening the compartment, and waited while Peterson entered the parked car, forced open the glove compartment, recovered a package of heroin and returned to the side of petitioner's car (R. 9a-10a). Petitioner then arranged to meet Peterson a few minutes later to give Peterson a chance to "check it out" (R. 10a). The meeting took place in a drug store where Peterson, following petitioner's instructions, handed $4,400 to petitioner in a folded newspaper (R. 11a).

ARGUMENT

There is no merit in the claim that the evidence was insufficient to show that petitioner had possession of the narcotics so as to bring into operation the statutory presumption. From the facts proved the jury could infer not only that petitioner had constructive possession or power to determine custody of the narcotics, which is all that the statute requires, but that he had in fact been in physical contact with the drug. *United States* v. *Cox*, 277 F. 2d 302 (C.A. 2).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

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JULY 1963

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